



IN THE
Supreme Court of the United States

October Term, 1977

No. 77-1077

JAMES D. GRAVES and ELEANOR GRAVES,

Petitioners,

v.

WHITE MOUNTAIN APACHE TRIBE, aka PORT
APACHE TIMBER COMPANY, CONTINENTAL
INSURANCE CO., and HAL BUTLER and
PEGGY BUTLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS, DIVISION ONE

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents White Mountain Apache Tribe, dba Fort Apache Timber Company, Continental Insurance Co., and Hal Butler and Peggy Butler request that the Petition for Writ of Certiorari in this matter be denied.

OPINION BELOW

The reported opinion of the Arizona Court of Appeals appears in the Appendix to the Petition, pages A-1 to A-4 and is reported at ___ Ariz. App. ___, 570 P.2d 803 (1977).

JURISDICTION

The Arizona Court of Appeals entered its order in Respondents' favor on September 20, 1977. A Petition for Rehearing was filed with the Arizona Court of Appeals by Petitioners on October 4, 1977, and on October 20, 1977 the Arizona Court of Appeals entered its order denying the Petition for Rehearing. A Petition for Review to the Arizona Supreme Court was filed on October 21, 1977 and denied by the Arizona Supreme Court on November 1, 1977. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The Petition for Certiorari enumerates four "Questions Presented." Question (1) asks this Court to overrule the long standing doctrine of tribal immunity. The remaining questions (2, 3, and 4) are but variations on a single theme, that the tribe waived its right to rely on its immunity from civil suit by engaging in business activities and purchasing liability insurance. Insofar as the Respondents are concerned, the only real question before this Court is:

Was the Arizona Court of Appeals correct in affirming the trial court's judgment that the doctrine of tribal immunity bars Petitioners' cause of action for personal injuries against the tribe, its agents and its insurance carrier.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, Sec. 8, Cl. 3 of the United States Constitution provides:

"The Congress shall have Power . . . to regulate commerce with foreign nations and among the several states and with the Indian tribes."

STATUTE INVOLVED

There are no Federal statutes involved.

STATEMENT OF THE CASE

Respondents adopt Petitioners' Statement of Case with the following minor corrections:

- (1) The Order of the Arizona Court of Appeals denying the Petition for Rehearing is dated October 20, 1977 (not October 21); and (2) the date of Petitioners' accident, which is the basis for this petition, is October 6, 1972 (not 1971).

REASONS FOR DENYING THE WRIT

- A. The State Courts Properly Analyzed the Questions of Law Involved and Should Not be Reviewed Here.

The Superior Court of Arizona and the Arizona Court of Appeals properly analyzed the factual situation presented and held, following a long line of United States Supreme Court cases beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 512 (1832), that Indian Tribes enjoy immunity from civil suit. The state courts properly analyzed Petitioners' argument that changing economic circumstances and purchase of liability insurance would not be grounds to reverse this Court and the Congress. In discussing Petitioners' attack on the trial court's ruling upholding the doctrine of tribal immunity, the Arizona Court of Appeals found that the doctrine of tribal immunity applied to the White Mountain Apache Tribe, to the Fort Apache Timber Company (FATCO) and to its general manager, respondent Hal Butler and his wife. With respect to the argument that the economic

realities of the twentieth century required the abandonment of the doctrine of tribal immunity, the Arizona Court of Appeals said:

"With reference to the argument concerning the slowing down of the integration of the tribe into the mainstream of the Arizona economy, i.e., the clash between the policies protecting Indians and those seeking to have them assimilated into the general population, this is a matter only Congress and the tribe can resolve, and it is not for this Court to make such a determination."

This decision was correct and should not be reviewed.

With respect to the argument that the purchase of liability insurance waived the doctrine of tribal immunity, the Arizona Court of Appeals simply stated:

"[W]e are unable to see how we can apply the rationale of these cases to the instant case which involves tribal immunity, especially since Congress has not waived the immunity in this case nor are we able to do so in the face of Art. 1, § 8, Clause 3 of the United States Constitution and the authorities interpreting this clause beginning with the case of *WORCESTER v. GEORGIA*, 31 U.S. (6 Pet.) 515 (1832), which would not permit this court to do so."

All of the reasons that Petitioners have put forth for abrogating the doctrine of tribal immunity, are reasons which should be presented to the Congress, and not to this Court. As the Arizona Supreme Court properly pointed out in *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971), the courts are without power to abrogate the doctrine of tribal immunity unless Congress consents.

"It is the opinion of this court that FATCO is a part of the TRIBE and as such enjoys the same immunity from suit that the TRIBE enjoys absent . . . the

consent of Congress to waive this immunity." [*White Mountain Apache Indian Tribe v. Shelley*, *supra*, 107 Ariz. at 7, 480 P.2d at 657]

Even the law review article critical of the decision in *White Mountain Apache Indian Tribe v. Shelley*, *supra*, recognized that it was up to Congress, and not the courts, to change the doctrine of tribal immunity. The author stated in 13 *Ariz. L. Rev.* 523 at 527 (1971):

"Today the concept of the Indian as a helpless ward has run full tilt into the demand that the Indian be treated as a fully responsible, first-class citizen. Only the Congress has the authority to resolve the impasse."

B. Petitioners' Argument as to Waiver by Purchase of Liability Insurance Was Properly Decided by the State Courts.

The argument that the Tribe waived its immunity by purchasing liability insurance, is one which is properly directed to the state and not the federal judiciary. Respondents do not concede that the Tribe could waive its immunity by purchasing liability insurance absent the consent of Congress. However, assuming *arguendo* that such is the case, the question of whether the purchase of liability insurance acts as such a waiver is a proper question for the state courts and does not raise a federal question. Furthermore, most recent cases have held that a municipality or other governmental agencies' procurement of liability insurance does not have any effect on its immunity from tort liability in that particular jurisdiction. For example see, *Powers v. Telander*, 129 Ill. App. 2d 10, 262 N.E.2d 342 (1970); *Anderson v. Calmus Community School Dist.*, 174 N.W.2d 643 (Iowa 1970); *Allen v. Ogden*, 219 Kan. 136, 499 P.2d 527 (1972); *Moore v. Fayette County*, 418 S.W.2d 412 (Ky. 1967); *Quecedo v. Montgomery County*, 264 Md. 590, 287 A.2d 257 (1972);

Cody v. Southfield-Lathrup School Dist., 25 Mich. App. 33, 181 N.W.2d 81 (1970); *Hughes v. County of Burlington*, 99 N.J. Super. 405, 240 A.2d 177 (1968); *Chavez v. Mountainair School Board*, 80 N.M. App. 450, 457 P.2d 382 (1969); *Rich v. Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972); *Henry v. Oklahoma Turnpike Authority*, 478 P.2d 898 (Okla. 1970); *Lovirnoff v. Helms Express, Inc.*, 309 F. Supp. 145 (W.D. Pa. 1970); and, *Fesal v. Hutchinson County*, 443 S.W.2d 937 (Tex. Civ. App. 1969). See also, *Prosser, Law of Torts* § 83, p. 555 (4th ed. 1971); and, *Annot.*, 68 A.L.R.2d 1436 (1959).

C. Immunity of Tribe from Personal Injury Action Does Not Raise Federal Question.

This is not a proper case to review the long standing doctrine of tribal immunity inasmuch as it involves an action for personal injuries and does not raise substantial economic and tribal policy questions which Petitioners argue may make the doctrine of tribal immunity invalid in the twentieth century. This is merely a personal injury action brought against various entities including Respondents herein. This is not the proper type of case to grant certiorari and to review the entire policy of tribal immunity inasmuch as it does not have a substantial economic or other impact that Petitioners claim. Furthermore, under Arizona law, a tribe, absent the consent of Congress, is immune from suit for personal injuries. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968).

CONCLUSION

Petitioners have fully failed to sustain their burden of establishing, under Rule 19, that there are "special and

important reasons" why the Writ should be granted. The decision of the Arizona Court of Appeals affirmed the long standing rule of this Court that Indian Tribes, absent consent of Congress, cannot be subject to suit for personal injuries. Petitioners have pointed to no conflict on this question in the various states, or in the Circuit Court of Appeals which conflicts with the ruling in the instant matter. The Arizona Court of Appeals correctly held that the trial court properly granted the Tribe, its general manager, and its insurance carrier immunity from suit for a personal injury action. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,
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